

No. _____

In The
Supreme Court of the United States

MATTHEW JOHN STICKLE,
Petitioner,

V.

COMMONWEALTH OF VIRGINIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. Was the evidence in this case unlawfully obtained as a result of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution, where police used sophisticated equipment to cross the curtilage and threshold of the home without a warrant, and conducted a search for both contraband and the IP address of the modem inside of the home to obtain the physical location of the contraband without a warrant?
- II. Was the evidence presented of Stickle's identity and the identity of a minor depicted in a photograph taken from a video, obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution ?
- III. Did the admissibility of other crimes evidence in the criminal prosecution violate the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution?
- IV. Was the evidence insufficient as a matter of law to sustain the convictions in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, where the evidence showed people other than Stickle had access to the computer where contraband was found during the relevant time periods?
- V. Did the Court lack jurisdiction to enter an order of nolle prosequi to charges which became the subject of three new indictments, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution?
- VI. Were the three new indictments void for lack of jurisdiction, and therefore barred by res judicata,

estoppel and double jeopardy; and, there use, therefore, violative of the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution?

VII. Did the admissibility into evidence of the titles, and written and oral descriptions of the evidence, which was hearsay, violate Stickle's right to due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution?

VIII. Did the court fail to preserve the record for meaningful appellate review, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution?

IX. Did the court's failure to admit into evidence at the re-trial Stickle's video-taped interview with law enforcement, admitted in the initial trial, a violation of Stickle's right to due process pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution?

X. Did the court's ruling, denying Stickle access to the second computer found for analysis a violation of Stickle's right to due process pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution?

XI. Was Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution violated where he was denied a change of venue, based upon pretrial publicity?

XII. Was Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution violated where the court rehabilitated jurors who expressed doubt regarding their ability to render a fair verdict in the trial?

XIII. Was Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S.

Constitution violated where the court admitted other crimes evidence in the initial trial, after ruling the evidence inadmissible, which trial resulted in a hung jury?

XIV. Did the sentence imposed violate the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment where the jury was not informed whether their recommended sentences would be served concurrent or consecutive, and where the court failed to impose a sentence consistent with the Eighth and Fourteenth Amendments' prohibition against cruel and usual punishment?

XV. Did indictments of second or subsequent offense violate the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution?

XVI. Did the use of cellular devices during the trial and denial of the motion for inquiry thereof violate Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution?

XVII. Did the prosecution engage in misconduct that violated Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution?

XVIII. Did the court engage in judicial misconduct that violated Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution?

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Record No.: _____

**IN THE SUPREME COURT OF THE UNITED
STATES**

**MATTHEW JOHN STICKLE,
PETITIONER,**

v.

**COMMONWEALTH OF VIRGINIA,
RESPONDENT.**

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Matthew John Stickle, respectfully petitions for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia, refusing the petition for appeal in reliance upon the Published Opinion and Per Curiam Opinion of the Court of Appeals of Virginia, ultimately affirming the convictions for possession of child pornography.

Petitioner maintains that the evidence was unlawfully obtained based upon a warrantless search of his home and curtilage by law enforcements' use of sophisticated equipment. In addition, law enforcement violated his Fifth and Sixth Amendment right to counsel and to remain silent during custodial interrogation and used the

information against him upon admitting that it promised not to use the information. Also, Petitioner argues that the evidence was insufficient to support the convictions because the evidence showed that the contraband appeared on the computer attributed to him over a period of several years, during which Stickle's roommates used and accessed the computer during the relevant time period, and Stickle never had exclusive possession of the computer. Lastly, Petitioner maintains that his right to due process was violated where he did not receive a fair trial based upon the individual and cumulative effect of the court's rulings and incidents of trial.

OPINIONS BELOW

Per Curiam Opinion of the Court of Appeals of Virginia, granting the petition for appeal in part and denying it in part, dated April 24, 2015 and May 8, 2017. Published Opinion of the Court of Appeals of Virginia, affirming the convictions, dated December 27, 2017. Order of the Supreme Court of Virginia, refusing the petition for appeal, dated June 28, 2018.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254, as this Petition for Writ of Certiorari is filed within ninety (90) days of the Order of the Supreme Court of Virginia, dated June 28, 2018 denying the Petitioner's Petition for Appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented in this case involve warrantless searches and seizures in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution; a violation of Miranda and the right to counsel, guaranteed by Fifth, Sixth, and Fourteenth Amendments to the U. S. Constitution; a violation of the Due Process Clause of the Fifth, and Fourteenth Amendments to the U. S. Constitution; and, a violation of the Eighth and Fourteenth Amendments to the U. S. Constitution.

STATEMENT OF THE CASE

Matthew John Stickle [herein “Stickle”] was indicted for three counts of manufacture child pornography, first and second or subsequent offenses, and 22 counts of possession with intent to distribute child pornography, first and second or subsequent offenses. The manufacture charges were the subject of a nolle prosequi based upon lack of jurisdiction.

On June 2, 2015 through June 4, 2015, the case was tried by a jury, resulting in a hung jury. On July 15, 2015, the Grand Jury indicted Stickle for three counts of possession of child pornography, first and second or subsequent offenses, in lieu of the three charges of manufacture that were the subject of the previous nolle prosequi.

On December 14, 2015 through December 16, 2015, the 22 charges that resulted in a hung jury and the three new indictments, the subject of the nolle prosequi in the initial trial was again tried by a jury. Stickle was found guilty and the jury

recommended a sentence of three (3) years for each of the three new possession charges, and eight (8) years for each of the initial 22 possession with intent charges. The motions to set aside the convictions were denied; and on March 21, 2016, Stickle was sentenced to serve consecutive sentences, totaling 185 years, rather than concurrent sentences, totaling 11 years. Stickle's motion objecting to the accuracy of the transcripts were denied.

Stickle petitioned the Court of Appeals for an appeal. The Court granted three assignments of error, and affirmed the convictions by published opinion, dated December 27, 2017. The Supreme Court of Virginia refused Stickle's petition for appeal, by Order, dated June 28, 2018.

On September 3, 2013, Lieutenant Scott Little and Investigator Iverson were conducting undercover operations regarding the possession and distribution of child pornography [herein "contraband"]. Little detected that a computer in his targeted area may have been "sharing" contraband through a software program called ARES. ARES is a peer to peer file sharing software program that allows users to obtain files from other users of the software who possess the file searched for over the internet. The software is used to obtain movies and music in addition to contraband. Through ARES, the file searched for is downloaded in bits and pieces from a limitless number of users who have downloaded the file searched for. However, ARES does not disclose the physical location or IP address of the download or locations from where the file is being obtained.

Little used a modified version of ARES, called ARES Round Up, which allows law enforcement to

observe more information than is available to the public with ARES. AREAS Round Up allows law enforcement to see the entire image being downloaded, rather than bits and pieces of the image. Also, AREAS Round Up allows law enforcement to perform a direct connect download of the image from the suspect computer to law enforcement's computer, rather than from multiple people. In addition, ARES Round Up allows police to obtain the IP address of the physical location of the file being downloaded and of the suspect. And, it prevents law enforcement from "sharing" any of the content of the file during the direct connect download of the file.

Little stated, "What my system does is it runs 24/7. It is set to target any known or notable SHAW values that are in the system as known or notable child pornography images within a certain region" and targets a broad area. He monitors any IP address displaying a notable SHAW value associated with contraband, waiting for them to go on line so he can attempt a direct connect to the suspect's computer and download the image on the suspect computer inside of the home. Little stated, "The purpose for doing the Peer to Peer operation is strictly to identify child pornography, obtain probable cause to do a search warrant and identify the location."

Little accessed the cable lines from the cable box in the curtilage of the home to reach the modem inside of the home. The modem connects the suspect computer to the internet and to Little's computer, via the same cable lines in the curtilage of the home. With access to the modem inside of the home from Little's computer, Little is able to record the IP

address of the subscriber of the internet service. In addition, through the modem, Little is able to conduct a direct connect download of the image on the suspect computer. Because Little is able to conduct a direct connect to the suspect computer and observe the image, Little is able to confirm that the image is contraband, rather than pieces of contraband; and, he is able to observe the suspect computer to be in possession of a whole image, rather than bits and pieces of an image.

Little used the information he obtained by employing ARES Round Up to obtain a search warrant to serve on the cable service provider to produce the street address of the IP address he obtained using ARES Round Up, the modified law enforcement version of ARES. At the suppression hearing, Little stated he had conducted an investigation into the premises and curtilage of the home and determined that the premises may contain contraband prior to obtaining a warrant.

The street address associated with the IP address led Little to a townhouse, owned by Margaret Mallory, Stickle's fiancé. Little obtained two identical computers from the location. A forensic examination of a computer set up with the name "Matt" contained contraband. Therefore, Little did not conduct a thorough examination of the second computer, claimed by Mallory. The images appeared on the computer over a three-year period of time from March 2010 to September 2013. Mallory made false and conflicting statements regarding her usage of the suspect computer.

Little video recorded an interview with Stickle. Little stated Stickle was advised of Miranda rights, which he waived. However, Stickle invoked

his right to counsel twice and Little continued to speak to Stickle, assuring Stickle that having invoked his rights, Little would not be able to use any evidence against him in court from that point on. During the forensic examination, Little found a folder marked "X." The folder, containing three videos, was in a separate part of the computer; and, it was not inside of the ARES folder that contained the contraband, in which Stickle was indicted for 22 images.¹ Little asked Stickle to identify the person in the video and the information would not be used against him after Stickle had invoked his right to counsel twice. Stickle identified the male. Upon a hearing on the matter, the court ruled the evidence of the identification could not be used. However, during the re-trial, the court permitted the father of the person in the video to identify him and Stickle as the persons depicted in the video. The Commonwealth located the father-witness based upon the information Stickle provided to law enforcement in violation of his right to counsel and Miranda, ruled excluded, previously.

During the interview, Stickle denied knowledge of the contraband found in the ARES folder on the computer and told Little he had roommates in the past who used his computer. Little did not investigate the information. However, one such roommate, Paul Sperry testified he used the computer in the past and observed Stickle's roommates use the computer. Specifically, he stated

¹ The folder contained three videos, which the Commonwealth alleges depicts Stickle and a male, approximately nine or ten years old appearing to engage in masturbation. Thereafter, the Commonwealth alleges Stickle performed an act of oral sodomy upon the male, which is not observed on the video.

he observed Stickle's roommate, Bruce McCall using Stickle's computer numerous times, including when Stickle was at work. Sperry stated McCall had his own computer, and when Sperry would ask why McCall was using Stickle's computer since he had one of his own, McCall would state that he was removing a virus or something. Perry stated that McCall appeared computer savvy when he observed him manipulating Stickle's computer. The transcript of the first trial indicates McCall lived with Stickle from 2008 to 2012; however, Sperry testified subsequent that he stated the time frame was 2008 to 2013. He knew it was 2013, because he lived with Stickle up until Stickle moved to Virginia, which was 2013. Mallory confirmed as much. The court reporter erased the original recording of the trial prior to filing the written transcripts; therefore, Stickle was not able to have the transcript corrected. When challenged, the Commonwealth offered into evidence an alleged alternate recording, which the reporter previously stated did not exist as proof of the accuracy of the transcript. Both Sperry and Mallory testified McCall lived with Stickle until he moved to Virginia in 2013.

REASONS FOR GRANTING PETITION

I. The evidence in this case was unlawfully obtained as a result of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments to the U.S. Constitution, where police used sophisticated equipment to cross the curtilage and threshold of the home without a warrant, and conducted a search for both contraband and the IP address of the modem inside of the home to obtain

the physical location of the contraband without a warrant.

“The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be abridged.” U.S. Constitution, Amendment IV; Katz v. United States, 389 U.S. 347 (1967). That language establishes unequivocally that at the very core of the Fourth Amendment is the right of a person to be in their own home free from unreasonable governmental intrusion. Payton v. New York, 445 U.S. 573 (1980). In terms that apply equally to seizure of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. Id. The area immediately surrounding and associated with the home – the curtilage – is part of the home itself for purposes of Fourth Amendment protection. Oliver v. United States, 446 U.S. 170 (1984); California v. Ciraolo, 476 U.S. 207 (1986).

Here, Little used sophisticated equipment to enter and search the curtilage and threshold of Stickle’s home without a warrant and to further search the inside of his home for evidence of probable cause of a crime to use against Stickle. Little’s actions violate the 4th Amendment’s prohibition against unreasonable searches and seizures. Subsequently, Little searched the contents of a separate folder labeled “X” in the computer that was unrelated to the ARES folder and search. Because the material in the folder “X” is derivative of the initial unlawful search, it is the “fruits of the poisonous tree”, and therefore unlawfully obtained in

violation of the Fourth Amendment to the U.S. Constitution, as well. Wong Song v. United States, 371 U.S. 471 (1963).

Little used his computer to connect to Stickle's computer inside of his home by way of the internet. Stickle's computer inside of his home accesses the internet by a connection to a modem – a physical device – located inside of the home. The modem is connected to a cable box in the curtilage of the home, provided by a cable company. The cable company assigns an IP address – a code – appended to the customer account and physical address. Little accessed the cable lines from the cable box in the curtilage of the home to reach the modem inside of the home to make a direct connect to Stickle's computer and internet access by use of sophisticated equipment. With ARES Round Up, software available only to law enforcement, but not to the general public, Little was able to observe and download a complete image of contraband downloaded to the suspect computer. In addition, Little was able to record the IP address of the location of the direct connection to the computer. Little used the information he obtained by employing ARES Round Up to obtain a search warrant to serve on the cable service provider to produce the street address of the IP address he obtained using the law enforcement, modified version of the Peer to Peer software. Little's actions constitute a search as he was not able to evidence of contraband and he was able to obtain a location via IP address of the contraband. Little would not have been able to determine that the matter was contraband and the location of the contraband without the use of the modified version of ARES.

The IP address is not available to users of the commercial version of ARES. Also, the commercial user is not able to make a direct connect download exclusively from one person. The modified version allows law enforcement to locate the suspect, when it otherwise would have no ability to do so. In addition, it allows police to conclusively determine that the item is contraband by having a completed image; and, the equipment allows police to append the contraband to a single suspect, rather than multiple suspects who hold a bit or piece of the image.

At the suppression hearing, Little stated he had conducted an investigation into the premises and curtilage of the home and determined that the premises may contain contraband prior to obtaining a warrant. Little used the cable lines, located in the curtilage of the home to access the modem inside of the home. Once Little unlawfully crossed the curtilage and threshold by use of sophisticated means, he further searched the inside of the home's modem and router for the address and content of internet activity. He had no warrant to do so. In Florida v. Jardines, 133 S.Ct. 1409 (2013), this Court reversed a conviction of an unlawful search of the home's curtilage, where law enforcement accompanied by a drug-sniffing dog obtained evidence of criminal activity – the order or marijuana emanating from inside – within the home's curtilage, and obtained a search warrant which produced marijuana inside the home. The Court stated the police cannot enter into the curtilage of the home to search for evidence of a crime to use against a person without a warrant.

In Groh v. Ramirez, 540 U.S. 551 (2004), the Court stated,

“Because ‘the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion stands at the very core of the Fourth Amendment, our cases have firmly established the basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Thus, absent exigent circumstances, a warrantless entry to search for weapons or contraband is unconstitutional even when a felony has been committed and there is probable cause to believe that incriminating evidence will be found within.’” Id. at 587-588. (quoting Silverman v. United States, 365 U. S. 505, 511 (1961); Payton v. New York, 445 U. S. 573, 586 (1980). (See also Kyllo v. United States, 533 U. S. 27, 29 (1961); Illinois v. Rodriguez, 497 U. S. 177, 181 (1990); Chimel v. California, 395 U. S. 752, 761-763 (1969); McDonald v. United States, 335 U. S. 451, 454 (1948); Johnson v. United States, 333 U. S. 10 (1948).

Here, Little conducted a search of the curtilage and inside of the home using cable lines from the curtilage into the home to search the modem and router inside of the home for probable cause that Stickle was engaged in criminal activity.

Little used sophisticated equipment – a modified version of the ARES peer to peer software called ARES Round Up – to conduct that search. Once he crossed the threshold of the home, he was able to use that equipment to search any and all electronic devices inside of the home accessing the internet. Upon locating a computer communicating with the internet, Little was able to peer over the shoulder of the user, observe what the user was viewing, and download it.

In Kyllo v. United States, 533 U. S. 27 (2001), the Court reversed a conviction where law enforcement used the sophisticated technology of a heat-seeking device to gather probable cause that marijuana was being grown inside of the dwelling. The Court stated, “Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment “search,” and is presumptively unreasonable without a warrant. Little used ARES RoundUp, a device not in general public use, to explore the details of Stickle’s home and use of electronic devices that were not discoverable by Little in any other way save for walking across the yard, into his home and observing his activity therein by virtual means.

The Commonwealth seemingly dismisses Kyllo as a relic of the past, having been resurrected by U.S. v. Jones, 565 U.S. 400 (2012). In Jones, the Court stated that the Government’s attachment of the GPS device to a vehicle, and its use of that device to monitor the vehicle’s movements constitutes a warrantless search under the Fourth Amendment. Id. The U.S. Supreme Court’s decision, rather than

a resurrection of Kyllo, serves as a reminder to all courts of its duty to protect the constitutional guarantees in the face of advancements in technology.

In Kyllo, the Court stated,

“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy. The Katz test – whether the individual has an expectation of privacy that society is prepared to recognize as reasonable has often been criticized as circular, and hence subjective and unpredictable. While it may be difficult to refine Katz when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences are at issue, in the case of the search of the interior of homes – the prototypical and hence most commonly litigated area of protected privacy – there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that exists, and that is acknowledged to be reasonable. To withdraw protection of this minimum expectation would be to permit police technology to erode the privacy guaranteed by the Fourth Amendment. We think that obtaining

by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ (quoting *Silverman*, 365 U.S., at 512), constitutes a search – at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” *Kyllo*, 533 U.S. 27, 31-32 (2001).

The fact that the *Kyllo* technology is available for sale in the open market today, misses the point. All current technology will become obsolete; therefore, such reasoning as a basis to permit law enforcement to intrude upon privacy interests would serve to undermine the very guarantees *Kyllo* and the constitution seek to protect. Ironically, the Court of Appeals for the District of Columbia, recently ruled directly opposite the Commonwealth on the same issue – use of sophisticated equipment without prior judicial approval. In *Prince Jones v. U.S.* (No. 15-CF-322 (D.C. App.) (Sept. 21, 2017)), the Court reversed a search for defendant’s cellphone, which led police to the defendant’s location. Police used a sophisticated device, called a Stingray to essentially hijack cell towers to track the defendant’s cell phone and locate defendant. Relying upon *Kyllo*, the Court stated, “In deciding whether a particular expectation of privacy is ‘reasonable’, this court aims to ‘assure preservation of that degree of

privacy against government that existed when the Fourth Amendment was adopted,” *Id.* (quoting *Kyllo*, 533 U.S. at 34.) In affirming *Jones*, *supra* 565 U.S. 400, the District of Columbia Court of Appeals stated, “When it comes to the Fourth Amendment, ‘means’ do matter.” *Id.*

Moreover, Little’s activation of his equipment “24/7” to search a broad area for SHAW values suggesting the presence of child pornography constitutes a generalized search of the entire area, violative of the Fourth Amendment as well. (See also *United States v. Karo*, 468 U.S. 705 (1984); *Arizona v. Hicks*, 480 U.S. 321 (1987).)

II. The evidence presented of Stickle’s identity and the identity of a minor depicted in a photograph taken from a video, was obtained in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution.

Little interviewed Stickle about a criminal offense in which Stickle was a suspect. Little stated he advised Stickle of his rights, pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Shortly into the interview, Stickle requested a lawyer, and on the second occasion, Little obtained information from Stickle with the understanding that the evidence would not be used against Stickle. The Commonwealth conceded as much and agreed the information would not be used against Stickle. *Davis v. United States*, 512 U.S. 452 (1994); *Arizona v. Robertson*, 486 U.S. 675 (1988).

However, the Commonwealth used the information to locate the parent of the male in the video, and the parent testified to the identity of Stickle and the male in the video. The identification

is derivative of the unconstitutional questioning and impermissible. Wong Sun v. United States, 371 U.S. 471 (1963).

III. The admissibility of other crimes evidence in the criminal prosecution violated the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

In Virginia, multiple charges may be brought in a single prosecution unless justice requires separate trials. (Spence v. Commonwealth, 12 Va. App. 1040 (1991); Scott v. Commonwealth, 274 Va. 636 (2007); Hackney v. Commonwealth, 28 Va. App. 288 (1998).)

While the trial court is given broad discretion regarding joinder under Virginia Supreme Court Rule 3A:6 (b), the trial court has limited discretion to deny severance under Virginia Supreme Court Rule 3A:10 (c). Goodson v. Commonwealth, 22 Va. App. 61 (1996). Justice often requires separate trials where highly prejudicial evidence of one of the crimes is not admissible in the trial of the other. Long v. Commonwealth, 20 Va. App. 223 (1995). A defendant should not be required to defend against two criminal charges in the same trial simply because they arose out of factually similar events. Godwin v. Commonwealth, 6 Va. App. 118 (1988). (See also Shaffer v. U.S., 362 U.S. 511 (1960); McElroy v. U.S., 164 U.S. 76 (1896).) Here the three indictments stemming from the contraband found in the folder marked “X” constitute other crimes evidence, which could not be prosecuted in Virginia for lack of jurisdiction. The images are highly prejudicial, because it impermissibly suggests to a jury that Stickle knowingly placed the 22 images on

the computer in the ARES folder by mere fact that he is depicted in the images in a different folder. The suggestion is impermissibly because it doesn't establish that Stickle placed the three videos in the folder merely because he is allegedly depicted in the image. Moreover, even if Stickle placed the three images in a folder in one part of the computer does not establish that he placed the 22 images in the ARES folder in a different part of the computer, especially given the fact that others accessed and used the computer. Therefore, the two sets of contraband are prejudicial when tried together and justice requires separate trials.

IV. The evidence was insufficient as a matter of law to sustain the convictions in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, where the evidence showed people other than Stickle had access to the computer where contraband was found during the relevant time periods.

The Commonwealth had no actual evidence that Stickle knew the material was on the laptop attributed to him, therefore the Commonwealth attempted to prove constructive possession. Drew v. Commonwealth, 230 Va. 471 (1986), quoting Powers v. Commonwealth, 227 Va. 474 (1984). Ownership does not give rise to a presumption of knowing or intentional possession. Lane v. Commonwealth, 223 Va. 713 (1982). Moreover, “when, as here, proof of constructive possession rests upon circumstantial evidence, ‘all circumstances proved must be consistent with guilt and inconsistent with innocence and exclude every reasonable hypothesis of innocence.’” Maxwell v. Commonwealth, 275 Va. 182

(1983). Mere proximity to the contraband is not sufficient to prove possession. Lane, supra. Here, the fact that others including Mallory, Sperry, McCall, and perhaps Elizabeth used and accessed Stickle's computer creates a reasonable doubt regarding who placed the contraband on the computer.

V. The court lacked jurisdiction to enter an order of nolle prosequi to charges which became the subject of three new indictments, in violation of the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Virginia Code §17.1-513 gives the Circuit Courts of the Commonwealth original jurisdiction of all indictments for felonies. Garza v. Commonwealth, 228 Va. 559 (1984). Here, the Commonwealth conceded the court did not have jurisdiction to try Stickle for manufacture as the alleged offense(s) would have occurred outside of Virginia. Therefore, the Commonwealth sought to withdraw the charges and indicted Stickle for possession of the same contraband. Jurisdiction is the authority of the court to act regarding a particular matter. (See Ghameshlouy v. Commonwealth, 279 Va. 379 (2010); Smith v. Commonwealth, 56 Va. App. 351 (2010).) Here, without jurisdiction, the court could take no action pertaining to the matter, including the granting of the nolle prosequi to withdraw the charge. Therefore, the reinstatement of the charges in the form of possession rather than manufacture is improper because the charge(s) expired for failure to prosecute based upon the erroneous order of the court granting the nolle prosequi.

VI. The three new indictments were void for lack of jurisdiction, and therefore barred by res judicata, estoppel and double jeopardy; and, there use, therefore, violative of the Due Process Clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.

A defect in subject matter jurisdiction cannot be cured by reissuance of process, passage of time, or pleading amendment. Also, any subsequent proceeding based on such a defective judgment is void or a nullity. Ferry Co. v. Commonwealth, 196 Va. 428 (1954). Here, the three new indictments constitute a reissuance of process, based upon a jurisdictional defect. Evans v. Smyth-Wythe Airport Comm'n, 255 Va. 69 (1998). As stated above, the court did not have jurisdiction to grant the nolle prosequi. Therefore, issuance of new indictments for possession instead of manufacture constitutes void indictments. Convictions based upon the void indictments violate due process and must be set aside.

Also, the legal doctrines of Res Judicata and Collateral Estoppel bar litigants from re-litigating the same issues that have been litigated or could have been litigated. Simmons v. Commonwealth, 252 Va. 118 (1996); Highsmith v. Commonwealth, 25 Va. App. 434 (1997).

VII. The admissibility into evidence of the titles, and written and oral descriptions of the evidence, which was hearsay, violated Stickle's right to due process in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Hearsay is an out of court assertion offered for the truth of the matter asserted. Lawlor v.

Commonwealth, 285 Va. 187 (2013). Here, the Commonwealth introduced into evidence written titles and descriptions of the contents of the videos. The descriptions were written by law enforcement prior to court. In addition, the titles were written out of court by the person who produced the videos, and, by the Commonwealth's own admission did not necessarily describe the contents therein. As such it is impermissible hearsay and should have been excluded.

VIII. The court failed to preserve the record for meaningful appellate review, in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution.

Stickle objected to the transcripts of the trials as being inaccurate and unreliable. The oral recording of the transcript of the initial trial was deleted upon the court reporter's certification, prior to being filed with the court and/or delivered to counsel. The transcript of the retrial, certified by the court reporter was the subject of a motion for inquiry regarding whether the court reporter was accessing her mobile device during the trial rather than transcribing.

Supreme Court of Virginia Rules 5A:7 and 5A:8 require an accurate and complete record on appeal in order to determine the issues raised. Smith v. Commonwealth, 56 Va. App. 351 (2010). Rule 5A:8 allows for correction of any errors to the transcript by the court upon objection by either party. Upon objection, the court held several hearings addressing the objections and ultimately determined not to correct the transcripts or set aside the convictions therefore. As a result, there is

insufficient evidence of the authenticity of the transcripts to determine the sufficiency of the evidence and the other issues raised on appeal.

IX. The court's failure to admit into evidence at the re-trial Stickle's video-taped interview with law enforcement, admitted in the initial trial, violated Stickle's right to due process pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution.

In the initial trial, the court admitted evidence of the video-taped interview Little conducted with Stickle. However, the court would not permit its introduction in the second trial. The video is exculpatory and constitutes impeachment evidence, as it undermines the Commonwealth's theory of the case and supports Stickle's theory that he had roommates who used his computer in the past. As such, it should have been admitted. Bynum v. Commonwealth, 57 Va. App. 487 (2011); Brady v. Maryland, 373 U.S. 83 (1961).

X. The court's ruling, denying Stickle access to the second computer found for analysis a violated of Stickle's right to due process pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution.

Mallory made false statements for 14 months that she never touched the suspect computer; however, the forensic analysis showed otherwise. She then admitted usage, but minimized the number of times by comparison to the forensic analysis. Little gave back the non-suspect computer Mallory claimed ownership of after a cursory analysis. However, there was substantial generic usage of

both computers. Stickle requested to analyze the non-suspect computer Mallory claimed ownership of in order to compare the generic usage of the two computers to determine whether Mallory used the suspect computer more often than she claimed or on the dates the contraband was downloaded, based upon her false and misleading statements surrounding usage of the suspect computer. Such evidence could have led to other exculpatory evidence; therefore, the court's refusal to make the evidence available to Stickle was a violation of Stickle's right to due process. Brady v. Maryland, 373 U.S. 83 (1961). The denial of access to the evidence is tantamount to destruction of evidence. California v. Trombetta et al., 467 U.S. 479 (1984).

XI. Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S.

Constitution was violated where he was denied a change of venue, based upon pretrial publicity.

During the two years this case was pending, the media ran approximately 16 stories regarding this case. Most of the reporting was inaccurate. On the morning of closing argument in the first case, the newspaper ran an article stating that Stickle was in a video with three children engaged in contraband, a euphemism for child pornography. In fact, only one child, not three was allegedly depicted in the three videos. On the Saturday morning before the Monday morning jury of the second child, after the juries had been summoned, the newspaper ran an article stating the three videos depicted Stickle molesting a child, which information it attributed to law enforcement, an agent of the Commonwealth Attorney. The court denied the change in venue,

despite the excessive publicity and erroneous reporting. The court abused its discretion in so ruling. Coppola v. Commonwealth, 220 Va. 243 (1979).

XII. Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution was violated where the court rehabilitated jurors who expressed doubt regarding their ability to render a fair verdict in the trial.

During voir dire, the jurors stated they were unsure if they could give Stickle a fair trial regarding the alleged other crimes evidence contained within the folder marked "X". The court merely rehabilitated them and allowed them to serve. However, Stickle had objected to the two groups of charges being tried together – the contraband in the ARES folder and the alleged contraband in the folder marked "X" – because it was too prejudicial. This was especially true based upon two years of pre-trial publicity. Therefore, Stickle's right to a fair trial, pursuant to due process was violated. Fisher v. Commonwealth, 236 Va. 403 (1988).

XIII. Stickle's right to a fair trial pursuant to the Fifth and Fourteenth Amendments to the U.S. Constitution was violated where the court admitted other crimes evidence in the initial trial, after ruling the evidence inadmissible, which trial resulted in a hung jury.

During the initial trial, Stickle was tried upon the 22 indictments based upon the contraband found in the ARES folder. The court ruled in limine that the material in the folder marked "X," which was the

subject of the nolle prosequi could not be used to show knowledge of the contraband in the ARES folder because it was too prejudicial, which the Commonwealth conceded. However, during vigorous questioning of law enforcement regarding failure to follow up the leads regarding use of the computer by other roommates, the court admitted the evidence, finding that defense counsel “opened the door” to its admissibility, allowing law enforcement to testify to the contents of the folder “X” as a basis for failure to pursue any leads other than Stickle. The nexus was tenuous at best. However, the momentum of the trial was clearly in favor of the defense at that point, as the Commonwealth was not able to exclude the reasonable hypothesis that someone other than Stickle placed the 22 images on the computer, as others used the computer. As a result, the court admitted the prejudicial evidence over objection. In McGowan v. Commonwealth, 274 Va. 689 (2007), the Supreme Court of Virginia stated inadmissible, prejudicial evidence is no less prejudicial merely because counsel “opened the door” to its admissibility. Vigorous cross examination should not be confused with opening the door to otherwise inadmissible evidence. This tactic can be used to deny a defendant a fair trial. Here, allowing the jury to consider this evidence undermined Stickle’s right to acquittal upon the only relevant evidence in the case, which was the contraband found in the ARES folder. The retrial as a result of the hung jury, gave the Commonwealth time to indict Stickle for possession of the nolle prosequi charges, join them with the 22 charges from the first trial, in which the prejudicial effect thereof substantially increased the

Commonwealth's chances of conviction, which occurred.

XIV. The sentence imposed violated the Eighth and Fourteenth Amendments' prohibition against cruel and unusual punishment where the jury was not informed whether their recommended sentences would be served concurrent or consecutive, and where the court failed to impose a sentence consistent with the Eighth and Fourteenth Amendments' prohibition against cruel and usual punishment.

The jury recommended Stickle be sentenced to three (3) years on each of the three possession charges that are the subject of the new indictments. The jury recommended the Stickle be sentenced to eight (8) years on each count of the 22 counts of the possession with intent to distribute charges that are the subject of the re-trial. In Virginia, sentences presumptively run consecutively unless otherwise stated by the court. However, in Virginia, juries are not given this information and are not permitted to be told any information regarding how sentences are served. Therefore, the court has no ability to discern whether or not the sentence recommended by the jury is a recommendation of a consecutive or concurrent sentence. A sentence recommendation of concurrent sentences would amount to an 11 year sentence. A consecutive one amounted to a 185 year sentence. The court decided to impose the harsher sentence of 185 years of consecutive sentences. Without definitive evidence that the jury intended a consecutive, rather than a concurrent sentence, the court's imposition of a 185 year sentence where the jury may have intended an 11 year sentence violates

the prohibition against cruel and unusual punishment. This is the case even had the jury intended a consecutive sentence, where the court has the ability, such as here, to ultimately impose the sentence it believes is just and fair. Therefore, the court abused its discretion imposing the sentence in this case. Gall v. United States, 552 U.S. 38 (2007).

XV. The indictments of second or subsequent offense violated the Fifth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

The Commonwealth concedes Stickle was not previously convicted under these statutes. However, the Commonwealth, relying upon Mason v. Commonwealth, 49 Va. App. 39 (2006) argues that the number of indictments is permitted according to the number of images found; and, the enhancement provisions of the statutes permit the Commonwealth to enhance punishment in the initial prosecution based upon the number of images found. The current case law requires review where thousands of images can be obtained in a single download, which was not the state of technology when Mason was decided. The statutory interpretation in light of the advancement in technology leads to absurd results, where one could conceivably receive one thousand indictments based upon that number of images in a single download.

XVI. The use of cellular devices during the trial and denial of the motion for inquiry thereof violated Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution.

A motion to set aside the verdict should be granted if supported by sufficient evidence. Wagoner v. Commonwealth, 770 S.E.2d 479 (2015). During one of the most critical motions hearings in the case, in which the defense was objecting to the admissibility of the hearsay, written titles evidence, out of the presence of the jury on the second day of retrial, the court, Commonwealth Attorney, and court reporter were observed accessing their mobile, cell phone devices about the same time. Stickle's motion to inquire regarding the content of the text messages and whether or not misconduct was occurring and to set aside the verdicts therefore was denied. The testimony of the hearing supplied sufficient evidence to grant the motion and further explore and obtain the substance of the questionable conduct. Failure to give leave of court to Stickle to further probe the simultaneous use of mobile devices at the time and under the circumstances undermines Stickle's right to a fair trial and the public trust in the outcome of the case.

XVII. The prosecution engaged in misconduct that violated Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution.

The Commonwealth elicited from law enforcement the false assertion that contraband was found on Stickle's cell phone. The fact that the image was not contraband should have been disclosed to the defense as exculpatory evidence prior to trial. Brady v. Maryland, 373 U.S. 83 (1961). Further, the Commonwealth permitting its former employee to search the file for the non-existent evidence; and, accessing its mobile device

during the trial constitutes misconduct and calls into question whether Stickle received a fair trial. In addition, Stickle objected to the disparate treatment in his prosecution compared to those similarly situated in violation of the Equal Protection Clause. Lehr v. Robertson, 463 U.S. 248 (1983); Tjan v. Commonwealth, 46 Va. App. 698 (2005).

XVIII. The court engage in judicial misconduct that violated Stickle's right to due process, pursuant to the Fifth and Fourteenth Amendments to the U.S. constitution.

A judge must diligently avoid not only impropriety but a reasonable appearance of impropriety. Wilson v. Commonwealth, 46 Va. App. 408 (2005), quoting Davis v. Commonwealth, 21 Va. App. 587 (1996). Here, the cumulative effect of the judge accessing and/or manipulating its mobile device at the same time as the Commonwealth's Attorney and the court reporter, refusing to recuse himself, quashing the subpoena of the court reporter's records, refusing to place the jury questions on the record created the appearance of impropriety, admitting into evidence previously barred evidence, and a host of other objectionable actions violated Stickle's right to a fair trial and due process.

CONCLUSION

For these reasons and those previously stated in the record of this case, Petitioner, Matthew John Stickle, respectfully requests that this petition for a writ of certiorari be granted and that his convictions be set aside based upon the numerous and substantial violations of this rights pursuant to the constitution of the United States of America.

Respectfully Submitted,

/s/ Patricia Palmer Nagel

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